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No. 03-806

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT MARIANA, MICHAEL J. McFADDEN, KAREN M. MORAN, and EDWARD M. NANKERVIS,

Petitioners,

v.

GERALD J. PAPPERT, in his official capacity as Acting Attorney General of the Commonwealth of Pennsylvania; and GREGORY J. FAJT, in his official capacity as Secretary of Revenue of the Commonwealth of Pennsylvania,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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PETITIONERS' REPLY ARGUMENT IN SUPPORT OF WRIT

Respondents argue that Petitioners have pointed to no split in authority among the circuit courts of appeals or to any unsettled issue of law as to which the Court should provide guidance. Resp. Brf. 4. The opposition overlooks the precedent cited in the Petition, particularly that which conflicts with the decision below.[1] The Court is not faced merely with erroneous factual findings or a misapplication of a properly stated rule of law. Respondents' attempt to recast the Petition and the issues before the Court in that light in an effort to demonstrate that no conflict exists is misplaced.

With respect to Petitioners' Sherman Act claims, Respondents' status as persons who petitioned the Commonwealth's judiciary and legislature to adopt the MSA and TSAA is irrelevant to the issues presented. Restraints on competition that are adopted or sanctioned by a State must satisfy the state action requirements articulated by the Court in *Parker v. Brown*, 317 U.S. 341 (1943), and *California Retail Liq. Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). That state officials, or any other persons, are immune under the *Noerr-Pennington* doctrine with respect to their act of petitioning the Commonwealth to adopt or sanction the restraints at issue cannot, and does not, immunize

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1. Respondents filed their opposition on January 5, 2004, one day before the Court of Appeals for the Second Circuit issued its decision in *Freedom Holdings, Inc. v. Spitzer*, No. 02-7492, 2004 WL 26498 (2d Cir. Jan. 6, 2004). As pointed out in Petitioners' Supplemental Brief, the decisions of the Third Circuit below and the Second Circuit in *Freedom Holdings* present a direct conflict of law among circuit courts presented with identical facts and, thus, may more properly be described as a "complete" or irreconcilable conflict.

the restraints themselves or their subsequent implementation and enforcement by state officials. The Third Circuit's ruling to the contrary in this case is in plain conflict with the decisions of the Court and other circuit courts and federal courts that have addressed these issues. *Columbia v. Omni Outdoor Adver. Inc.*, 499 U.S. 365, 383 (1991) (*Parker* applies to State's action implementing restraint of trade; *Noerr-Pennington* protects right to petition for restraint of trade); *Freedom Holdings, Inc. v. Spitzer*, No. 02-7492, 2004 WL 26498 (2d Cir. Jan. 6, 2004) (*Noerr-Pennington* doctrine applies to pre-adoption and pre-legislation advocacy for restraint, *Parker* doctrine applies to restraint State adopts in response to such advocacy, *i.e.*, results of petitioning); *In re Airport Car Rental Antitrust Litig.*, 693 F.2d 84, 87 (9th Cir. 1982) (state official's liability governed by *Parker*; liability of private entity for requesting restraint governed by *Noerr-Pennington*); *see also Nursing Registry, Inc. v. Eastern North Carolina Reg. Emer. Med Servs.*, 959 F. Supp 298 (E.D.N.C. 1997) (claims against private parties analyzed under *Noerr-Pennington*, claims against government officials analyzed under *Parker*); *Bright v. Ogden City*, 635 F. Supp. 31, 33 (D. Utah 1985) (State may lack state action immunity under *Parker* even when private actors are immune from liability under *Noerr-Pennington*).

Respondents rely on several circuit court and district court cases in arguing that "similar or identical" challenges to the MSA have been made and rejected. Resp. Brf. 4. If Respondents' reliance were properly placed, then such fact would only confirm that the present conflict reaches beyond the circuit courts and decisions cited herein. None of the cases cited by Respondents, however, deals with the precise Sherman Act claims and issues presented. Namely, none of the cases addressed or decided whether state officials and

the restraints of trade they agree to in a settlement agreement may be immune from scrutiny under the antitrust laws, notwithstanding that the state officials fail actively to supervise the private anticompetitive conduct that the settlement sanctions.

Respondents cite to, and rely exclusively on, the Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as grounds for denying review of the constitutional standing issues presented. Respondents' opposition offers no explanation or discussion of the *Lujan* case or its application, particularly given the conflict presented in the Petition. Moreover, *Lujan* did not involve standing under the Commerce Clause, nor the relevant standard for determining standing on a motion to dismiss. The issue in *Lujan* was whether an environmental group sufficiently demonstrated standing to challenge federal legislation on a motion for summary judgment.

When a State regulates suppliers in a manner that violates the Commerce Clause, the suppliers *as well as customers of their products and services* have standing to challenge the state regulation under the Constitution. *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276, and *Huish Detergents, Inc. v. Warren Cty.*, 214 F.3d 707 (6th Cir. 2000). The decision below does not merely present a misapplication of a properly stated rule of law; the decision improperly states the applicable rule of law and is in conflict with the decisions of the Court and at least one other Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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